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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 274

CLARK'S FERRY BRIDGE COMPANY, APPELLANT,

vs.

THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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APPELLEE'S STATEMENT OF MATTER MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES AND MOTION TO DISMISS OR AFFIRM.

All of the questions which appellant company desires to raise are primarily factual in nature, and have already been raised and considered at length before and by the Public Service Commission of the State and the Superior Court on appeal. The decisions ultimately made on these points were reached in contemplation of the Federal rights now invoked and were intended and believed to constitute a full recognition of those rights. The opinions of the Commission and the court clearly indicate the scope of their consideration and fully answer appellant's present contentions. The Public Service Commission of the Commonwealth of Pennsylvania, appellee herein, consequently now

submits that the instant appeal presents no substantial Federal question for the consideration of the Supreme Court of the United States.

The investigation into the rates of appellant which the Public Service Commission instituted on its own motion on January 14, 1930, was not the first proceeding relative to the reasonableness of these rates. The evidence developed in this proceeding was only part of the whole upon which the order of February 2, 1932, now attacked, was based, the remainder of the record being that which had been developed in 1925 and 1926 in a prior proceeding in the same matter.

The property of the Clark's Ferry Bridge Company which is used in serving the public, consists of a single reinforced concrete highway bridge crossing the Susquehanna River about 14 miles north of Harrisburg, together with certain parcels of real estate used as bridge head sites, a superintendent's residence, certain toll houses, and the earth fill approaches of a prior bridge.

The bridge now in use was built by appellant company in 1924 and 1925, and upon complaint filed, the Commission then took testimony, including all evidence which appellant company desired to present, and on such record determined on June 8, 1926, that the then present fair value of the company's property used and useful in serving the public was $767,800, and that the reasonable maximum gross revenue for such service was $85,905 per year. An appeal was taken from said report and order of the Commission to the Superior Court of the Commonwealth of Pennsylvania, but this appeal was voluntarily withdrawn by the appellant company before decision.

Any finding, determination or order of the Commission unless set aside, annulled or modified upon appeal or upon injunction, is by the terms of Article VI, Section 31, of The Public Service Company Law of Pennsylvania, 66 Purdon's

Penna. Statutes, Section 881, made conclusive upon any of the parties affected thereby. The words of the Act are as follows:

> "Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

The conclusiveness of such findings as to the reasonableness of rates under this provision of the law of Pennsylvania has already been considered and enforced by the Supreme Court of Pennsylvania: *New York & Pennsylvania Co.* v. *New York Central R. R.*, 267 Pa. 64, 70 (1920). It was likewise recognized by your Honorable Court as being properly binding in all cases where, as here, the order required the party affected to do or refrain from doing some specific act: *New York Central R. R. et al.* v. *New York & Pennsylvania Co.*, 271 U. S. 124 (1926).

Upon the withdrawal of this appellant's appeal in the Superior Court of Pennsylvania in 1927, the findings of the Public Service Commission made in 1926 as to the fair value of the company's property at that time, including any special allowances for various theoretical values claimed, the annual allowance for the current depreciation and the total annual gross revenue which might be obtained all became conclusive upon this appellant under the above provision of the law.

Subsequent to the proceedings above outlined, the great increase in automobile traffic and the development of concrete State highways leading to this toll bridge vastly increased the gross revenues obtained by appellant company. In 1929 a second complaint was filed against the then existing rates but led to no evidence upon which a determination as to the reasonableness of the rates could be made.

The proceeding of the Commission instituted on January 14, 1930, assumed the accuracy of the prior findings as to the values of the bridge property and their applicability to the present proceeding and its decision refused to set aside and abandon them. Appellant company, however, endeavored, both before the Commission and before the Superior Court of the Commonwealth, to establish substantially higher values of property and greater allowances for annual depreciation than had previously been adopted, although its own witness stated that unit costs of construction had not increased but rather had decreased from 1925, when the bridge was built, to 1931 and 1932, when the case was being considered before the Commission.

Appellant's contention to the Commission which supported these theories and which is now the basis of the Third Assignment of Error was essentially that the bridge was worth when built substantially more than it cost appellant to have the work done. The contention that the contractor who built the bridge took the contract at too low a price is vitiated by the fact that the project was let upon competitive bids from eight different reputable contractors. The claim is further based in part on the fact that the contractor also miscalculated the possibilities of high water in the river and due to this error sustained a loss said to have amounted to $213,000 on a contract totaling about $550,000. This amount of loss is obtained only by adding into the value of the bridge, the total value of all of the substantial amount of materials, machinery and equipment, which were washed down the river in a flood which occurred. Obviously these losses through accident do not add to the value of the structure.

The earth fills which are referred to in the Sixth Assignment of Error were the approaches to the old bridge now abandoned. They have absolutely no present usefulness as bridge approaches, but merely because they are on the up-

stream side of the bridge, they possibly have some limited use as a protection from ice and flood conditions. There is no suggestion they have deteriorated materially, but it is clear they are of extremely limited value as breakwaters or ice barriers. As approaches their obsolescence is complete; as breakwaters they are unnecessarily bulky and expensive. Their value is consequently not in any way commensurate with the cost to reproduce them, as appellant claims.

The balance of the claim of increased property value as of the date of construction (Eighth Assignment of Error) is based upon claims of special value of the bridge head lands for toll bridge purposes, substantially in excess of the market value of these lands which has elsewhere been included in the rate base in the full amount sought. This claim is fallacious for three reasons. (1) The original bridge in this vicinity was built over 100 years ago by the Commonwealth of Pennsylvania and the location was developed as a river crossing in very early days; the site of the first bridge was the natural place to build a bridge in this vicinity and when this company acquired the existing structure in 1915 it merely took over what had already been developed; appellant's claim for a special allowance of $100,000 in value for this reason amounts to a capitalization of its right, under the licenses issued by the War Department and other Federal authorities and the franchise given by the Commonwealth, to have a bridge at this point and to the capitalization for its private benefit of values which have been developed by the construction of State Highways leading to it; this is specifically forbidden by The Public Service Company Law (Article III, Section 6 (*a*), 66 Purdon Penna. Statutes, Section 241) enacted in 1913 before this appellant was incorporated. (2) The claim of added value of appellant's real estate for toll bridge purposes beyond actual market value is precisely the claim of special "railroad value" rejected by the court in the

Minnesota Rate Cases (*Simpson* v. *Shepard*), 230 U. S. 352 (1913). (3) A claim of special value in excess of the market value of the property in use is essentially a claim of the right to capitalize the monopolistic features of the utility's service which the whole system of regulation is intended to prevent.

The gist of the decisions of the authorities of the Commonwealth is that all questions of property value were determined in 1926 when the actual cost prices were fresh and theoretical cost estimates unnecessary, and that there was no need in law or in good sense to abandon these figures and substitute new ones based on estimate only. This can be sustained either on the basis that under the peculiar circumstances of this case the original cost of the bridge property in 1925 is the most important factor of value now, or on the basis that in view of the evidence that costs are now materially less than in 1925 the evidence of cost in 1925 is more reliable evidence of what reproduction cost would be now, than is the testimony of appellant's witnesses advocating substantially higher estimates of reproduction cost. We believe this completely answers the latter part of the Third Assignment of Error and all of the Seventh Assignment of Error.

In regard to the Fourth and Fifth Assignments of Error, the court will note that as no estimates of cost to reproduce were made the Public Service Commission and the Superior Court actually did not make the findings assigned as error but merely concluded the evidence thereon did not justify the abandonment of the valuation of 1926.

The valuation fixed by the Commission in 1932 is exactly that made in 1926 with no deduction for depreciation accrued in the interim. Appellant's figures would indicate in substance that notwithstanding this accrued depreciation values were substantially higher today than in 1925.

The allowance for depreciation accruing annually is that allowed in 1926. In view of the fact the authorities of the Commonwealth in continuing in effect the valuation of 1926 regardless of depreciation have not reduced the return which appellant is allowed, and since in utilities of this type no portion of any reserve which might be accrued can be reinvested in plant to replace worn out property, there is no need to permit a reserve for depreciation accruing greater than that allowed. The amount allowed is substantially greater than one which compounded at 4 per cent would replace the property at the end of its life. The amount claimed by appellant would do this to the extent of two and one-half times if held until then and would have no useful purpose in the meanwhile. The Ninth Assignment of Error is without merit.

We believe the rate of return of 7 per cent referred to in the Tenth Assignment of Error is adequate for appellant under present economic conditions: *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* — U. S. —, 53 S. Ct. 637 (1933); *Wabash Valley Electric Co.* v. *Young,* 287 U. S. 488 (1933); *Smith* v. *Illinois Bell Tel. Co.,* 282 U. S. 133, 160 (1930); *Illinois Bell Tel. Co.* v. *Gilbert,* decided April 29, 1933, District Court, Northern District of Illinois, not yet reported; *Kanakee Water Co.* v. *Gilbert,* decided January 6, 1933, District Court, Northern District Illinois, not yet reported. Appellant carries insurance, allowed as an operating expense, against loss by flood and the present construction of concrete State highways is an adequate protection against loss of business through the building of new bridges. Its condition is consequently not worse than that of other utilities.

The remaining Assignments of Error merely cumulate and summarize those already covered herein.

Both during the appeal in the prior appeal of 1926 and 1927 and at the present time appellant has obtained an

order superseding the rates prescribed by the Commission until such time as the appeal might be decided and in connection therewith has issued to persons passing over the bridge rebate slips entitling them to a return of the portion of the rate collected in excess of that which might ultimately be found to be reasonable. In the prior proceeding, however, out of approximately $32,821 of rebate slips issued, only about $8,510, or one-fourth of them, were ever presented for redemption.

The Public Service Commission believes that all questions of law and fact involved in the present proceedings were fully, adequately, completely and justly determined by it and the Superior Court of the Commonwealth of Pennsylvania and that appellant's present claims of confiscation of its property without due process of law in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States are without substantial merit. The Public Service Commission consequently submits that no Federal question is involved in the decision of the Superior Court of the Commonwealth and that your Honorable Court should not accept jurisdiction of the present appeal upon writ of error. The Public Service Commission, therefore, moves your Honorable Court to dismiss the instant appeal upon writ of error or to affirm the judgment of the Superior Court of the Commonwealth without oral argument.

And, it will ever pray, etc.

THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,
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